The United States of America v Menteri Sumber Manusia Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–342–07 OF 2019
NORDIN HASSAN J
8 JANUARY 2020

Labour Law — Reference — Reference by Minister — Minister for Human Resources referred to Industrial Court for adjudication security guard's representation that he was unfairly dismissed — Guard was employed by American Embassy in Kuala Lumpur pursuant to contract of employment — Whether guard was performing a governmental and sovereign function of the United States of America in protecting its embassy and its occupants and property from any form of threat or attack — Whether American Embassy had dismissed guard in exercise of its sovereign authority — Whether doctrine of sovereign immunity applied to deny Industrial Court of jurisdiction over embassy's action in dismissing guard — Whether Minister's reference of matter to Industrial Court for adjudication was error of law — Industrial Relations Act 1967, s 20(3)

The third respondent ('R3') was employed as a security guard at the applicant's embassy in Kuala Lumpur pursuant to a contract of employment. Under the contract, failure to report for duty was a ground for dismissal. After three alleged instances of failing to report for duty, R3 was dismissed from employment. R3 lodged a complaint with the Industrial Relations Department ('IRD') that he was unfairly dismissed and he sought reinstatement. After attempts to resolve the matter at the IRD level failed, the first respondent ('the Minister') referred R3's complaint to the Industrial Court for adjudication pursuant to s 20(3) of the Industrial Relations Act 1967. The applicant filed the instant judicial review application to quash the Minister's reference, prohibit the Industrial Court from adjudicating on R3's representation and declare that the Industrial Court had no jurisdiction to make any determination on R3's dismissal on the ground of sovereign immunity. The applicant also pointed out that it was prejudiced by the Minister's inordinate and unexplained delay of about 11 years in making the reference. Inter alia, R3 contended that the judicial review application should be dismissed because his employment contract with the applicant was subject to the laws of Malaysia and the applicant had not shown that the Minister had acted illegally, irrationally or unreasonably in referring his representation to the Industrial Court.

Held, allowing the judicial review application and setting aside the decision of the first respondent:

(1) The Minister's decision to refer R3's representation to the Industrial Court suffered infirmities of error of law and irrationality (see para 41).

(2) R3 was employed directly by the applicant's embassy and not by any private security company. Looking at his duties and functions, he was performing a governmental and sovereign function of the applicant and not merely a domestic function. Clearly, a security guard's duty was integral to the sovereign activity of the state and its embassy, not only to provide security but to maintain the inviolability of the embassy's premises. This could not be considered as merely auxiliary (see paras 29 & 31).

(3) The applicant had dismissed R3 in the exercise of its sovereign authority (*jure imperii*) and as such the doctrine of sovereign immunity applied. Consequently, the Industrial Court had no jurisdiction to hear R3's representation. The Minister had committed an error of law in referring R3's representation to the Industrial Court. The representation was frivolous and vexatious and there was no serious question of facts or law to be tried (see paras 32–34).

(4) Although s 20 of the IRA 1967 did not specify the time period within which a representation had to be referred to the Industrial Court, the fact that it took the Minister in this case 11 years to make the reference was clearly inordinate delay for which no explanation was given. The gross delay prejudiced the applicant (see paras 37 & 40).

[Bahasa Malaysia summary

Responden ketiga ('R3') bekerja sebagai pengawal keselamatan di kedutaan pemohon di Kuala Lumpur berdasarkan kontrak pekerjaan. Di bawah kontrak tersebut, kegagalan melaporkan diri bertugas adalah sebagai alasan untuk diberhentikan. Setelah tiga kali dituduh gagal melaporkan diri bertugas, R3 telah diberhentikan kerja. R3 membuat aduan kepada Jabatan Perhubungan Perusahaan ('JPP') bahawa beliau telah diberhentikan secara tidak adil dan meminta diambil semula. Setelah percubaan menyelesaikan perkara tersebut di peringkat JPP gagal, responden pertama ('Menteri tersebut') merujuk aduan R3 ke Mahkamah Perusahaan untuk adjudikasi berdasarkan s 20(3) Akta Perhubungan Perusahaan 1967. Pemohon memfailkan permohonan semakan kehakiman semasa untuk membatalkan rujukan Menteri tersebut, menghalang Mahkamah Perusahaan untuk mengadili representasi R3 dan memohon deklarasi bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk membuat keputusan mengenai pemberhentian R3 atas alasan kekebalan pemerintah. Pemohon juga menegaskan bahawa beliau telah diprejudiskan oleh kelewatan melampau oleh Menteri tanpa alsan untuk tempoh hampir 11 tahun dalam membuat rujukan tersebut. Antara lain, R3 berpendapat bahawa permohonan semakan kehakiman harus ditolak kerana kontrak pekerjaannya dengan pemohon adalah tertakluk kepada

undang-undang Malaysia dan pemohon tidak menunjukkan bahawa Menteri telah bertindak secara tidak sah, tidak rasional atau tidak wajar dalam merujuk representasi beliau ke Mahkamah Industri.

Diputuskan, membenarkan permohonan semakan kehakiman dan mengetepikan keputusan responden pertama:

(1) Keputusan Menteri untuk merujuk representasi R3 ke Mahkamah Industri adalah kecacatan khilafan undang-undang dan tidak rasional (lihat perenggan 41).

(2) R3 bertugas secara langsung di bawah kedutaan pemohon dan bukan mana-mana syarikat keselamatan swasta. Melihat tugas dan fungsinya, beliau menjalankan tugas fungsi pemerintahan dan kedaulatan pemohon dan bukan hanya fungsi domestik. Jelas, tugas pengawal keselamatan adalah penting bagi aktiviti kedaulatan negara dan kedutaannya, bukan hanya menjaga keselamatan tetapi untuk menjaga keamanan premis kedutaan. Ini tidak boleh dianggap hanya tugas sokongan sahaja (lihat perenggan 29 & 31).

(3) Pemohon telah menolak R3 dalam menjalankan tugas kedaulatan (*jure imperii*) dan dengan itu doktrin kekebalan pemerintah diguna pakai. Dalam pada itu, Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mendengar representasi R3. Menteri telah membuat kekhilafan undang-undang dalam merujuk representasi R3 ke Mahkamah Perusahaan. representasi tersebut adalah remeh dan menyusahkan dan tidak ada persoalan fakta atau undang-undang yang serius untuk dibicarakan (lihat perenggan 32–34).

(4) Meskipun s 20 dari APP 1967 tidak menetapkan tempoh masa di mana suatu representasi harus dirujuk ke Mahkamah Perusahaan, fakta bahawa Menteri dalam kes ini memerlukan selama 11 tahun untuk membuat rujukan tersebut jelas merupakan kelewatan melampau yang mana alasan tidak diberikan. Kelewatan tersebut memprejudiskan pemohon (lihat perenggan 37 & 40).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee Abdullah And Another Appeal [2018] 2 MLJ 537; [2018] 2 CLJ 513, FC (refd)

Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; and; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah [2017] UKSC 62, SC (refd)

British High Commission v Jansen [2015] 3 LRC 565 (folld)

Commonwealth of Australia v Milford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475, SC (refd)

Council of Civil Service Union & Ors v Minister of Civil Service [1985] AC 374, HL (refd)

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)
Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors [2017] MLJU 2302; [2017] 10 CLJ 743, HC (refd)
Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Mr N Bunnet v Ambassade de France An Royanme Uni Case No 220492112012 (folld)
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Faik Kee [1983] 2 MLJ 35, PC (refd)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Sabah El Leil v France (2011) 54 EHRR 449 (refd)
Stefanov v United State of America Civil Case No 2450912010 (folld)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317, CA (refd)
Village Holdings Sdn Bhd v Her Majesty The Queen In Right of Canada [1988] 2 MLJ 656 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Federal Constitution art 5
Industrial Relation Act 1967 s 20, 20(3)
Interpretation Acts 1948 and 1967 s 54(2)

Lim Heng Seng (Amardeep Singh Toor a/l Amardeep Singh with him) (Lee Hishammuddin Allen & Gledhill) for the applicant.
Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Ragunath Kesavan (Liew Chih Ching with him) (Kesavan) for the third respondent.

Nordin Hassan J:

INTRODUCTION

[1] This is the applicant's judicial review application against the decision of the the first respondent, the Minister of Human Resources ('the Minister') to refer the third respondent's representation to the Industrial Court.

[2] The applicant seeks, inter alia, the following reliefs:

(a) an order of certiorari to quash the Minister's decision;

(b) an order of prohibition to prohibit the Industrial Court from adjudicating on the third respondent's representation; and

(c) a declaration that the applicant and its embassy are immune from the jurisdiction of the Industrial Court in respect of the third respondent's representation or claim.

THE SALIENT FACTS

[3] The relevant facts in the present application are as follows:

(a) on 20 September 1998, the third respondent commenced employment at the applicant's embassy in Kuala Lumpur as a guard pursuant to an employment contract dated 28 September 1998;

(b) the employment contract was supplemented by a document titled 'Condition of Employment' (Guard Services Only) which was signed by the third respondent. Failure to report for duty is stated as a ground for dismissal in this Condition of Employment;

(c) after failing to report for duty for the third time and after given written warning for the said failure, on 4 April 2008, the third respondent was dismissed from his employment with the appellant;

(d) dissatisfied with the dismissal, on 23 May 2008, the third respondent filed a representation to the Director General of Industrial Relations ('DGIR') at Kuala Lumpur Industrial Relations Department ('KL IRD') claiming his. dismissal was without just cause and excuse and seeking for reinstatement to his former position as a guard at the applicant's embassy;

(e) on 28 September 2018, a conciliation meeting was held at KL IRD between the applicant's embassy and the third respondent but was unsuccessful;

(f) thereafter, vide letter dated 22 April 2019 from the IRD's head office in Putrajaya, the embassy was informed that the Minister had decided to refer the third respondent's representation to the Industrial Court for adjudication; and

(g) hence, the present judicial review application by the applicant.

THE APPLICANT'S SUBMISSION

[4] The applicant's main argument is that the applicant and its embassy are immune from the jurisdiction of the Industrial Court with regards to the third respondent's representation by virtue of the principle of sovereign immunity.

[5] The applicant further contended that there was an inordinate and unexplained delay of about 11 years to refer the third respondent's representation to the Industrial Court from the date the representation was filed at the KL IRD.

[6] In the circumstances, the applicant submitted that the Minister erred in law in referring the representation to the Industrial Court pursuant to s 20(3) of the Industrial Relation Act 1967 ('the IRA 1967').

THE FIRST RESPONDENT'S SUBMISSION

[7] Conversely, the first respondent submitted that the Minister had not erred in referring the third respondent's representation to the Industrial Court on the following reasons:

(a) the third respondent's representation raises a serious issue of fact and/or law to be adjudicated by the Industrial Court; and

(b) the question of sovereign immunity is a serious question of fact and/or law which must be determined by the Industrial Court.

THE THIRD RESPONDENT'S SUBMISSION

[8] The third respondent submitted that the applicant's application for judicial review ought to be dismissed on the following grounds:

(a) the doctrine of sovereign immunity does not apply in respect of the employment contract;

(b) the applicant has submitted to the Malaysian jurisdiction and subjected itself to the laws in Malaysia in respect of this employment contract;

(c) the applicant had failed to show that the first respondent had acted illegally, irrationally or unreasonably in referring the third respondent's representation to the second respondent; and

(d) the third respondent's 'Right to livelihood' under art 5 of the Federal Constitution.

FINDINGS OF THIS COURT

[9] It is trite law that a decision in relation to the exercise of public duty or function may be reviewed on grounds of illegality, irrationality, procedural impropriety or disproportionality.

[10] The meaning of illegality, irrationality and procedural impropriety has been succintly explained by Lord Diplock in *Council of Civil Service Union & Ors v Minister of Civil Service* [1985] AC 374, and adopted by our apex courts which are as follows:

> By 'illegality' as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be

decided, in the event of dispute, by those persons, the judges, by whom thejudicial power of the state is exercisable. A

By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review. B C

I have described the third head as 'procedural impropriety' rather than failure to obseNe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to obseNe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. D E

(see also *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee Abdullah And Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537, *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147). F

[11] Further, in the case of *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 317, the error of law has been described as follows: G

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) *or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* H

[12] In the present case, the applicant is challenging the decision of the Minister in referring the third respondent's representation to the Industrial Court pursuant to s 20(3) of the IRA 1967 which states: I

20 Representations on dismissal

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or

A excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representation may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

B ...

(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

C (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[13] The Minister's discretionary power under s 20(3) is wide but it must be exercised judiciously and must not frustrate the object of IRA 1967. This is clearly explained by the Supreme Court in the case of *Minister of Labour v Lie Seng Fatt* [1990] 2 MLJ 9, as follows:

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There is no question that the power of the minister under s 20(3) of the Act is wide and the language use by the legislature would seem to confer on the minister a wide E discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case *provided of course he has acted bona fide, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself*. (Emphasis added.)

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[14] In determining whether the Minister has exercised its power correctly, the court has to examine the facts available before the Minister and to determine, inter alia:

(a) whether the representation is frivolous or vexatious;

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(b) whether there is a serious issue of law or facts to be tried;

(c) whether a reasonable man in a similar circumstance would have made the same decision made by the Minister; and

H (d) whether the minister has gone wrong in law.

[15] This process of evaluation has been laid down by the Federal Court in *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97, as follows:

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[3] It is the appellant's counsel's contention that in judicial review proceedings, a meticulous examination of the facts presented to the Minister must be conducted by the High Court as the reviewing court regardless of whether the Minister's decision was to refer or not to refer the matter to the Industrial Court under s 20(3) of the Act. According to counsel, a contrary approach would lead to dual standards being imposed depending

on whether the employer or the employee is applying for judicial review. In the regard counsel cites in support the following passage in the judgment of the Court of Appeal in Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another Appeal [1997] 1 CLJ 665 which states:

> *Thus, when a question arises as to whether the Minister has correctly exercised his discretion under s 20(3) of the Act, it is the duty of the court to undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations under s 20(1) are neither frivolous nor vexatious, a decision not to refer is liable to be quashed by certiorari.*

Quite clearly, the Court of Appeal takes the view that the reviewing court is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. There was much debate before us about the words 'meticulous examination of the facts'. *In our view, there is no magic in the use of that phrase. It does not set any universal standard. It is not an inflexible term. It merely means that there should be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person, similarly circumstance, would have arrived at the decision which the Minister had done*. The extent of that duty had been succinctly stated by Abdoolcader SCJ in *Malaysian Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 when he quoted, with approval a statement of Lord Denning HL in the case of *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 at p 1326:

> *The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section, it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account or vice versa; or has otherwise gone wrong in law.* (Emphasis added.)

[16] Reverting to the present case, the core issue here is whether the applicant and its embassy is immune from the jurisdiction of the Industrial Court with regards to the third respondent's reinstatement claim on the principle of sovereign immunity.

[17] The principle of sovereign immunity provides that one state should not be subject to the jurisdiction of another state. It is a concept of international law which developed out of the principle *par in parem non habet imperium* (equals do not have authority over one another).

[18] This doctrine of state immunity in civil proceedings is to promote comity and good relations between states by respecting the states sovereignty as explained in the case of *Sabah El Leil v France* (2011) 54 EHRR 449, where the courts's observation has been summarised as follows:

> 52. The Court further reiterates that such limitation must pursue a legitimate aim and that state immunity was developed in international law out of the principle par in parem non habet imperium, by virtue of which one state could not be subject to the jurisdiction of another. It has taken the view that the grant of immunity to a state in civil proceedings pursue the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty.

[19] Further, sovereign immunity is granted as a matter of law as explained in the case of *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors* [2017] MLJU 2302; [2017] 10 CLJ 743, where it was held as follows:

> (2) Sovereign immunity is granted, not as a matter of courtesy, but as a matter of law. The protection attended by the doctrine of sovereign immunity applies not only to sovereign states but also to the servant or agents of the foreign state. The Actions of the Government of the Commonwealth of Australia, through ATO, the first defendant and the second defendant, which were being impugned by the plaintiff via encl. 2 was immune from the jurisdiction of the Courts of Malaysia by reason of sovereign immunity. Consequently, this was a plain and obvious case for encl. 2 to be struck out and dismissed (paras 72 & 77).

[20] This doctrine of absolute immunity had changed over the years where a restrictive doctrine of state immunity has been introduced.

[21] In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; and; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, the doctrine of the restrictive doctrine has been explained by Lord Sumption as follows:

> By 1978, however, the position of common law had changed as a result of the decision of the *Privy Council in The Philippine Admiral* [1977] AC 373 and the Court of Appeal in *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529. These decisions marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe. *The restrictive doctrine recognised state immunity only in respect of acts done by a state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis)*. Moreover, and importantly, the classication of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its juridical character: *Playa Larga (Owners of Cargo lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244.

[22] In the same case, at para 53, Lord Sumption further said this:

> As a matter of customary international law, if an employment claim arises out of an inherent sovereign or act of the foreign state, the latter is immune.

[23] The next pertinent issue is the application of this doctrine in Malaysia. A

[24] On this issue, the application of restrictive doctrine of state immunity in Malaysia, where there is no written law, is pursuant to s 3 of the Civil Law Act 1956 as explained in the case of *Village Holding Sdn Bhd v Her Majesty The Queen In Right of Canada* [1988] 2 MLJ 656, where Shankar J said this: B

> (9) So far as a foreign sovereign is concerned, I hold that s 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit. C

[25] Further, the Supreme Court in *Commonwealth of Australia v Milford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475, discussed the same issue and ruled as follows: D

> Section 3 of the Civil Law Act 1956 *only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956.* That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided E after that date. It is correct, as appointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as The 'Parlement Beige'. That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in The 'Philippine Admiral' was delivered by the Privy Council in November 1975, it was binding authority in so far as our courts are concerned. *Therefore, by that time the common law position an sovereign immunity in this country would be that the absolute theory applied to all actions in personam but the restrictive view applied to actions in rem.* When the Trendtex case was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but *we see no reason why our courts aught nat to agree with that decision and rule that under the common law in this country, the doctrine of restrictive immunity should also apply.* G That is more so in view of the very strong persuasive authority in The 'I Congreso' case in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied as common law in respect of actions over trading vessels regardless of whether the actions were in rem or in personam. *We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later an should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.* H
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> Finally, we have to consider whether the acts complained of were done within the trading or commercial activity of the foreign state, that is, *whether they were acta jure gestionis or whether the acts were within the sphere of the governmental or sovereign activity of that state, that is, whether they were acta jure imperii?* We were of the view I that the acts of the two Australian customs officers considered in the whole context of this case could not be classified as 'trading or commercial' (see The 'I Congeso case) and agree with Mr Abraham that the exercise of the functions of the customs

arm of the Australian government in the perculiar circumstances of this case could not be classed as acta jure gestionis, ie commercial in accordance with accepted international standards and were therefore acta jure imperii. In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agong has recognized the Commonwealth of Australia as a foreign state. (Emphasis added.)

[26] The next question here is whether the doctrine is applicable in the present case.

[27] In this regard, the test to be applied as explained in Benkharbouche's and by Supreme Court in *Milford* case is whether the act done by the state in exercise of sovereign authority (*jure imperii*) or act of a private nature (*jure gestionis*). If it is an exercise of its sovereign authority the restrictive doctrine of immunity applies.

[28] Returning to the present case, the third respondent was employed as a guard with the applicant's embassy in Kuala Lumpur. His duties and functions as mentioned in the affidavit in support of the application are the following:

(a) perform protective guard services to safeguard all employees, visitors, property and equipment of the applicant government from violent attacks, demonstrations, intruders and theft;

(b) conduct inspections focusing on access control at all the applicant government's facilities and residences; and

(c) respond to routine and emergency occurrences at the applicant government's facilities and residences to eliminate any situation which threatens the safety or security of the applicant government's employees, facilities or residences.

[29] Clearly, from the duties and functions aboved mentioned, the third respondent was involved in the security of the embassy, was performing governmental and sovereign functions of the applicant and not merely performing domestic function like any other security services. The third respondent was directly employed by the embassy and not by any private security company.

[30] In this regard, reference to several cases from foreign jurisdiction is instructive which are the following:

(a) in *British High Commission v Jansen* [2015] 3 LRC 565, the Supreme Court of Sri Lanka ruled that the doctrine of sovereign immunity applied

in a dismissal suit against the British High Commissioner by its former security assistant who had been dismissed after being found sleeping while on duty. The court opined as follows:

> Drawing in aid the rationale of these cases before me, I turn to the question: which side of the divide the contract of employment that the UK government entered into with the respondent as a security assistant falls? Is it an act jure imperii or jure gestionis? In my view, *the employee's duties in this case (the respondent's duties as a secutiry assistant to the premises of the UK High Commission) were not only to provide security but also to maintain the inviolability of the embassy premises. The maintenance of security in the mission could not be classified as merely auxiliary* but, in my view, since the duties of the respondent were *integral to the core sphere of sovereign activity*, the contract of employment was not effected in the capacity of a private citizen and the functions of the respondent were enlisted in the interest of the public service of the UK government and on these premises *I am irresistibly drawn to the inescapable conclusion that immunity becomes applicable in the instant case.*

(b) in the case of *Mr N Bunnet v Ambassade de France An Royanme Uni* Case No 220492112012 (The Employment Tribunal at London Central, 2019), the claimant who was employed by French embassy in United Kingdom as security guard at the French Ambassador's residence claimed for holiday pay. However, the Employment Tribunal ruled that the principle of sovereign immunity applies and the Tribunal had no jurisdiction to hear the claim. In the Tribunal decision it stated, inter alia, the following:

> 118. ... I find that *there is a unique character to the work of providing security at the Embassy* and private non-military security guard may and *often are involved in the function of guarding the premises of the mission*.
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> ...
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> 120. *I find that providing security and protection to the inviolable and unique character of mission premises is not a purely domestic function. The question of security of such premises may involve dealing with confidential security information particular to that state. It is not the same as providing security services for any private company, such as in the example given of a supermarket.*
>
> 121. My finding is that there is enough for the respondent to show that *the claimant was performing state functions and therefore a sovereign act in the guarding of the mission premises.* (Emphasis added.)

(c) next in *Stefanov v United State of America* Civil Case No 2450912010 (Sofia) District Court, Second Division, 2014), the Court held that the respondent was immune from the jurisdiction of the Court in respect of the dismissal claim by its former security guard at the respondent's embassy in Bulgaria.

[31] Clearly, a security guard's duty is an integral to the sovereign activity of

the state and its embassy not only to provide security but to maintain the inviolability of the embassy's premises. This cannot be considered as merely anxiliary.

[32] In the instant case, the dismissal of the third respondent by the applicant was in the exercised of its sovereign authority (*jure imperii*) and as such the doctrine of sovereign immunity is applicable. Consequently, the Industrial Court has no jurisdiction to hear the third respondent's representation.

[33] Thus, the Minister had committed an error of law in referring the representation to the Industrial Court. The representation is frivolous and vexatious and there is no serious question of facts or law to be tried.

[34] The question here is plain and clear relating the jurisdiction of the Industrial Court on the principle of sovereign immunity. This is not a fit case to refer to the Industrial Court for adjudication. The issue of sovereign jurisdiction can be resolved at the Minister's level as wide discretionary power has been given to the Minister pursuant to s 20(3) of the IRA 1967.

[35] The other issue raised by the applicant is the inordinate delay to refer the third respondent's representation to the Industrial Court.

[36] It is undisputed fact that it is about 11 years from the third respondent's claim was filed at KL IRD and the time the Minister referred the claim to the Industrial Court.

[37] Although s 20 of the IRA 1967 does not specified the time period for the representation to be referred to the Industrial Court but 11 years period is clearly an inordinate delay and no explaination was given for the said delay.

[38] Section 54(2) of the Interpretation Acts 1948 and 1967 provides that where no time is prescribed within which anything shall be done, that thing shall be done with all 'convenient speed'.

[39] In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Faik Kee* [1983] 2 MLJ 35, the Privy Council ruled, inter alia, that 'convenient speed' must be 'as soon as possible' or 'within a reasonable time' and not 'as late as possible'.

[40] In the present case 11 years is an inordinate and unexplained delay would only prejudice the applicant if the third respondent's representation is to be adjudicated by the Industrial Court.

CONCLUSION

[41] In the circumstances, I find, the decision of the Minister to refer the third respondent's representation to the Industrial Court suffer infirmities of error of law and irrationality.

[42] As such, the applicant's application for judicial review is allowed with costs of RM6,000 to be paid by the first respondent and third respondent each to the applicant.

[43] The decision by the Minister is set aside.

Order accordingly.

Reported by Ashok Kumar